

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LIANE CARLSON, an individual,

Plaintiff,

V.

CITY OF SPOKANE, municipal corporation in and for the State of Washington; and HEATHER LOWE, an individual.

Defendant.

NO: 13-CV-0320-TOR

**ORDER RE: CROSS MOTIONS FOR
SUMMARY JUDGMENT**

14 BEFORE THE COURT are the following motions: Defendant's Motion for
15 Summary Judgment (ECF No. 40), Plaintiff's Partial Motion for Summary
16 Judgment (ECF No. 58), Plaintiff's Motion to Exclude Defendants' Expert Judith
17 Clark (ECF No. 46), Defendants' Motion to Exclude Expert Testimony of Jennifer
18 Morphis (ECF No. 54), and Plaintiff's Motion to Strike the Declarations of Gita
19 George-Hatcher, Dan Daling, and David Chandler (ECF No. 78). These matters
20 were heard with oral argument on October 17, 2014. Alexandria T. John and

1 Robert A. Dunn appeared on behalf of Plaintiff. Sean D. Jackson and Michael A.
2 Patterson appeared on behalf of Defendants. The Court has reviewed the briefing
3 and the record and files herein and heard from counsel, and is fully informed.

4 **BACKGROUND**

5 Plaintiff alleges claims of disability discrimination, wrongful discharge in
6 violation of public policy, intentional and negligent infliction of emotional distress,
7 and wrongful withholding of wages. Defendants now move for summary
8 judgment on all claims. ECF No. 40. Plaintiff has filed a cross-motion for partial
9 summary judgment on (1) the disability element of her ADA claim; (2) the adverse
10 employment action element of her ADA claim; and (3) her WLAD claim for
11 disparate treatment. ECF No. 58. For the reasons discussed below, this Court
12 grants and denies Defendants' motion in part, and grants and denies Plaintiff's
13 motion in part.

14 **FACTS**

15 Plaintiff Liane Carlson began working for Defendant City of Spokane
16 ("Defendant City") in 2007 as a Human Resources Specialist, which position later
17 was renamed Human Resources Analyst. ECF Nos. 41 at 1; 59 at 1. In her
18 position, Plaintiff was responsible for human resources and labor relations work
19 within several departments. ECF No. 50 at 45, 47 (document under seal). Plaintiff
20 regularly received positive evaluations and performance reviews from her

1 superiors and coworkers and had no record of discipline. ECF Nos. 41 at 2; 59 at
2 24.

3 On July 19, 2011, Plaintiff suffered a debilitating stroke, which required
4 leave for rehabilitation to address right-side paralysis and speech issues. ECF Nos.
5 41 at 2; 59 at 4. Plaintiff was placed on FMLA leave, and when that leave was
6 exhausted, resorted to leave hours from the City's shared leave bank and hours
7 donated by other City employees. ECF No. 41 at 3.

8 In January 2012, Plaintiff's doctor cleared Plaintiff to return to work for up
9 to eight hours of teleworking per week, ECF No. 59 at 4, and by late February,
10 Plaintiff was cleared to work two days per week at home and one half day in the
11 office. ECF Nos. 41 at 4; 59 at 5. At this time, Plaintiff met with her supervisor,
12 Human Resources Director Heather Lowe ("Defendant Lowe"), requesting
13 accommodations in order to perform her job duties. ECF Nos. 49-4 at 47; 59 at 5.
14 Initially, Plaintiff worked two and a half days a week, using intermittent leave
15 share for the remaining portion of the week.¹ ECF No. 59 at 5. During this period
16 following her return to work, neither Plaintiff nor Defendant Lowe received any

17 ¹ Intermittent leave share allows employees who have exhausted their leave
18 balances to apply for leave that has not been used by other employees. ECF No.
19 45-2 at 52-53. This program allows employees to maintain a full forty-hour
20 workweek so as not to lose pay or benefits. *Id.*

1 complaints about Plaintiff's job performance, nor did Defendant Lowe voice any
2 complaints about the sufficiency of Plaintiff's performance.² ECF Nos. 49-4 at 34;
3 59 at 5.

4 At the end of February, Defendant Lowe was informed by payroll that the
5 standard City practice was to allow intermittent leave share only if a bargaining

6 _____
7 ² Although the parties agree that Plaintiff did not receive any complaints about her
8 work, they do dispute Plaintiff's overall work performance. Defendants contend
9 Plaintiff's work was "severely limited" to such activities as checking her email,
10 reviewing HR magazines, generating a Title VI report, and viewing HR-related
11 websites. ECF No. 72 at 2. As a result, Defendants contend Plaintiff's work
12 activities constituted far less than the work her position demanded. *Id.* On the
13 other hand, Plaintiff argues that Defendant Lowe was responsible for assigning
14 Plaintiff work and thus Defendant Lowe's failure or refusal to assign certain
15 projects to Plaintiff should not reflect on Plaintiff's ability to fully perform the
16 duties of her position. ECF No. 83 at 4-5. According to Plaintiff, "Defendants
17 never requested or scheduled Plaintiff Carlson to perform any job function during
18 the six-week time frame she worked after her stroke which Plaintiff refused or was
19 unable to do, or which Plaintiff otherwise requested not be assigned to her." *Id.* at
20 5.

1 unit had specifically negotiated for that right. ECF Nos. 41 at 4; 45-2 at 52-53.³
2 Accordingly, Defendant Lowe informed Plaintiff that she was not eligible for
3 intermittent leave share. ECF Nos. 41 at 4; 59 at 5-6; 68-1 at 9-10. Plaintiff
4 instead had the option of either taking full-time leave share or returning to work on
5 a modified schedule, the latter option resulting in reduced pay status and affected
6 benefits. ECF Nos. 41 at 4; 59 at 5. Plaintiff subsequently opted for full-time
7 leave share.⁴ ECF No. 51 at 6. As a result, Defendants did not implement
8 Plaintiff's accommodation requests. ECF No. 70 at 3.

9 During a meeting in May 2012, Plaintiff provided Defendant Lowe a letter
10 from her physician, Dr. Mark Gordon, stating that Plaintiff could return to full-time
11 work but would require accommodations due to her disability. ECF Nos. 59 at 6-7,

12 ³ The work agreement to which Plaintiff's benefits were tied did not actually
13 preclude intermittent leave share. ECF Nos. 68-1 at 20; 70 at 2. In fact, another
14 City employee, subject to the same type of employment as Plaintiff, used
15 intermittent leave share in October 2013. ECF Nos. 68-1 at 12-13; 70 at 3.
16 Instead, the final determination whether to grant intermittent leave rested with the
17 HR department. ECF Nos. 68-1 at 20; 70 at 2.

18 ⁴ Plaintiff appealed Defendant Lowe's decision regarding Plaintiff's leave options
19 to the City Administrator, who subsequently affirmed Defendant Lowe's decision.
20 ECF Nos. 41 at 5; 45-1 at 43.

1 41 at 6. Although Dr. Gordon did not recall speaking with anyone from the City
2 regarding Plaintiff's job duties, Plaintiff provided Dr. Gordon with an HR job
3 description—which Defendant Lowe provided to Plaintiff—in an effort to help Dr.
4 Gordon understand Plaintiff's job duties and assess her ability to return to work.
5 ECF Nos. 41 at 6-7; 59 at 6; *see* ECF No. 50 at 45, 47 (document under seal). In
6 light of this information, Dr. Gordon opined Plaintiff would be able to perform the
7 essential job functions and physical requirements of her position provided she
8 receive the following accommodations: flexible scheduling, longer and more
9 frequent work breaks, work from home as needed, mobility products, one-handed
10 keyboard and speech recognition software, recorder and writing aids, lightweight
11 briefcase, long handled reacher, hand cart, handicap parking space.⁵ ECF Nos. 41
12 at 6; 52 at 33-34 (document under seal); 59 at 7.

13 Instead of implementing Dr. Gordon's proposed accommodations,
14 Defendant Lowe—uncertain about Plaintiff's ability to return to work in light of
15

16 ⁵ In his deposition testimony, Dr. Gordon clarified that he released Plaintiff back to
17 work not knowing definitively whether or not she would succeed but
18 understanding the difficulty of assessing a patient's capabilities until she is
19 returned to the position and given an opportunity to try. ECF No. 52-1 at 78
20 (document under seal).

1 her speech limitations⁶—scheduled Plaintiff for a Fitness for Duty examination
2 with Dr. Paula Lantsberger of Occupational Medicine Associates. ECF No. 41 at
3 7; 59 at 7. After the examination, Dr. Lantsberger provided Defendant Lowe with
4 her progress notes, which indicated that based on the examination results and the
5 job description provided by Defendant Lowe,⁷ Plaintiff could perform her work
6 duties. ECF Nos. 49-4 at 52-53; 59 at 8. Defendant Lowe subsequently contacted

7 ⁶ During this time, Plaintiff was continuing ongoing treatment with speech
8 therapist Lisa Kettleson. ECF No. 52-1 at 90 (document under seal). In her
9 treatment notes, Ms. Kettleson recorded that Plaintiff was “continu[ing] to struggle
10 with verbal fluency for high level speaking situations” and having “difficulty
11 getting words out and pronouncing them clearly.” *Id.* at 88, 90-91, 96 (document
12 under seal). Ms. Kettleson further noted that Plaintiff would be able to think of
13 which words to say but would have difficulty pronouncing them. ECF No. 69-1 at
14 75 (document under seal). At this time, Ms. Kettleson opined that, although
15 Plaintiff would need continued therapy in order “to return to work in 100% of the
16 way,” Plaintiff could return to work in a limited capacity considering she “was
17 doing well” and “could communicate in a lot of scenarios.” *Id.* at 77 (document
18 under seal).

19 ⁷ This was the same job description Plaintiff previously provided Dr. Gordon. ECF
20 No. 52-1 at 49-50.

1 Dr. Lantsberger to clarify and expand upon Plaintiff's job duties, indicating that
2 ninety percent of Plaintiff's job involved interactive verbal communication. ECF
3 Nos. 49-4 at 53-56; 50 at 55 (document under seal); 59 at 8. Defendant Lowe also
4 suggested, in light of her concern that Plaintiff would not be able to handle the
5 responsibilities of her HR position, that Plaintiff be placed on medical layoff for
6 sixty days with a subsequent reevaluation at the end of that period. ECF Nos. 49-4
7 at 59; 52 at 62 (document under seal); 59 at 8-9.

8 On June 5, 2012, Dr. Lantsberger ultimately determined Plaintiff would be
9 unable to perform the essential elements of her position, even with
10 accommodation. ECF Nos. 41 at 8; 52 at 36-37 (document under seal); 59 at 9.
11 Dr. Lantsberger recommended a sixty-day medical layoff with a reevaluation at the
12 end of that period. ECF Nos. 41 at 8; 59 at 9. Accordingly, Defendant Lowe sent
13 Plaintiff a letter placing her on medical layoff status effective June 22, 2012, with
14 the request that Plaintiff return in sixty days for re-evaluation. ECF Nos. 41 at 9;
15 59 at 9; 72 at 5. Shortly thereafter, Plaintiff sought a second opinion from Dr.
16 Castleman. ECF Nos. 41 at 9; 59 at 9. Dr. Castleman recommended that the City
17 let Plaintiff attempt her job on a trial basis, stating no one could say with certainty
18 whether Plaintiff would be able to perform her position unless she was given
19 opportunity to try. ECF Nos. 41 at 9-20; 52 at 40 (document under seal); 59 at 9,
20 72 at 5.

1 Plaintiff did not return after sixty days for a medical evaluation, nor did she
2 return to work anytime thereafter. ECF No. 59 at 9. Instead, on June 21, 2012,
3 Plaintiff filed a complaint with the Human Rights Commission alleging violation
4 of her rights under state and federal law. ECF No. 41 at 11. Plaintiff subsequently
5 withdrew her complaint and initiated this suit on August 31, 2013. ECF No. 1.

6 **DISCUSSION**

7 **I. Cross-Motions for Summary Judgment**

8 Summary judgment may be granted to a moving party who demonstrates
9 “that there is no genuine dispute as to any material fact and that the movant is
10 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party
11 bears the initial burden of demonstrating the absence of any genuine issues of
12 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then
13 shifts to the non-moving party to identify specific genuine issues of material fact
14 which must be decided by a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.
15 242, 256 (1986). “The mere existence of a scintilla of evidence in support of the
16 plaintiff’s position will be insufficient; there must be evidence on which the jury
17 could reasonably find for the plaintiff.” *Id.* at 252.

18 For purposes of summary judgment, a fact is “material” if it might affect the
19 outcome of the suit under the governing law. *Id.* at 248. A dispute concerning any
20 such fact is “genuine” only where the evidence is such that a reasonable jury could

1 find in favor of the non-moving party. *Id.* In ruling upon a summary judgment
2 motion, a court must construe the facts, as well as all rational inferences therefrom,
3 in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372,
4 378 (2007). Only evidence which would be admissible at trial may be considered.
5 *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).

6 **A. Failure to Accommodate (ADA & WLAD)**

7 Plaintiff alleges that Defendants violated the ADA and the WLAD by
8 failing to accommodate her disability. Defendants have moved for summary
9 judgment on these claims on the grounds that Plaintiff is not an individual qualified
10 for reasonable accommodations because she could not perform the essential
11 elements of her job with or without accommodation. ECF No. 40. Plaintiff has
12 moved for partial summary judgment on the following issues: (1) Defendants knew
13 and perceived her as disabled prior to terminating her employment, and (2)
14 Plaintiff suffered an adverse employment action when Defendants placed her on
15 medical layoff status. ECF No. 58. Since the parties have not identified any
16 relevant distinctions between the ADA and the WLAD for purposes of the instant
17 cross-motions, the Court will address Plaintiff's state and federal claims together.

18 Both the ADA and the WLAD require an employer to make reasonable
19 accommodations for an employee with a disability. 42 U.S.C. § 12112(b)(5);
20 Wash. Rev. Code § 49.60.180(1)-(3). To prevail on a failure to accommodate

1 claim under the ADA, a plaintiff must prove that “(1) she is disabled within the
2 meaning of the ADA; (2) she is a qualified individual able to perform the essential
3 functions of the job with reasonable accommodation; and (3) she suffered an
4 adverse employment action because of her disability.” *Samper v. Providence St.*
5 *Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012) (quotation and citation
6 omitted). Failure to accommodate claims are not analyzed under the familiar
7 *McDonnell Douglas* burden shifting framework because liability does not “turn on
8 the employer’s intent or actual motive.” *Peebles v. Potter*, 354 F.3d 761, 766 (8th
9 Cir. 2004).

10 The elements of a failure to accommodate claim under the WLAD are
11 similar. The plaintiff must prove that (1) she had a sensory, mental, or physical
12 abnormality that substantially limited her ability to perform the job; (2) she was
13 qualified to perform the essential functions of the position; (3) she gave her
14 employer notice of the disability and its accompanying substantial limitations; and
15 (4) upon receiving notice, the employer failed to affirmatively adopt measures that
16 were both available and medically necessary to accommodate the disability. *Riehl*
17 *v. Foodmaker, Inc.*, 152 Wash.2d 138, 145 (2004). The WLAD and the federal
18 ADA have the same purpose; thus, Washington courts look to federal cases for
19 guidance. *MacSuga v. Cnty. of Spokane*, 97 Wash. App. 435, 442 (1999) (*citing*
20 *Fahn v. Cowlitz Cnty.*, 93 Wash.2d 368, 376 (1980)).

1 As an initial matter, the parties do not dispute that Defendants knew Plaintiff
2 was disabled within the meaning of the ADA and WLAD at all times relevant to
3 this action and that Plaintiff suffered an adverse employment action when
4 Defendant City placed her on medical layoff status. ECF Nos. 71 at 3; 83 at 3.
5 Because there is no genuine dispute of material fact surrounding these issues, this
6 Court finds it appropriate to **GRANT**, in part, Plaintiff's motion for summary
7 judgment regarding these issues.

8 1. Defendant Lowe's Liability under the ADA

9 Defendants initially move to dismiss as a matter of law Plaintiff's ADA
10 claims against Defendant Lowe. ECF No. 40 at 3. The ADA limits liability to an
11 "employer" as defined under the Act. 42 U.S.C. § 12111. As such, individual
12 defendants cannot be held personally liable under the ADA. *Walsh v. Nev. Dep't
13 Human Res.*, 471 F.3d 1033, 1038 (9th Cir. 2006); *cf. Brown v. Scott Paper
14 Worldwide Co.*, 143 Wash.2d 349, 361 (2001) (holding that, under the WLAD,
15 "individual supervisors, along with their employers, may be held liable for their
16 discriminatory acts"). However, an employer can be held vicariously liable for the
17 discriminatory acts of its employees. *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124,
18 1141 (9th Cir. 2001). Accordingly, Plaintiff's ADA claims against Defendant
19 Lowe are dismissed and this Court shall only consider Defendant City's liability
20 under these claims.

1 2. Essential Functions

2 Defendants move for summary judgment on Plaintiff's failure to
3 accommodate claims against Defendant City on the grounds that Plaintiff was
4 unable to engage in effective verbal communication, a purportedly essential
5 function of the HR Analyst position. ECF No. 40 at 4. Plaintiff, on the other hand,
6 maintains verbal communication is merely a physical requirement of her position
7 and thus is not relevant to determining whether she is a qualified individual under
8 the ADA. ECF No. 67 at 13-14. In the alternative, Plaintiff contends that
9 questions of fact exist regarding her ability to verbally communicate with or
10 without accommodation. *Id.* at 15-21.

11 The burden of establishing that a function is essential "lies uniquely with
12 the employer." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 991 (9th Cir.
13 2007) (en banc) (quotation and citation omitted). To satisfy this burden, the
14 employer must produce admissible evidence which, if credited by the trier of fact,
15 would support a finding that the function at issue is essential. *Samper*, 675 F.3d at
16 1237. Relevant evidence includes, but is not limited to: the employer's judgment
17 as to which functions are essential; written job descriptions prepared before
18 advertising or interviewing applicants for the job; the amount of time spent on the
19 job performing the function; the work experience of past incumbents in the job;

1 and the current work experience of incumbents in similar jobs. 29 C.F.R.
2 § 1630.2(n)(3); *Bates*, 511 F.3d 974 at 991.

3 However, “‘essential functions’ are not to be confused with ‘qualification
4 standards,’ which . . . are ‘personal and professional attributes’ that may include
5 ‘physical, medical [and] safety’ requirements.” *Bates*, 511 F.3d 974 at 990 (citing
6 29 C.F.R. § 1630.2(n)(1)). As the Ninth Circuit noted, the difference is “crucial”
7 because an employee need not meet all of the employer’s “qualification standards”
8 to show that she is qualified for purposes of the ADA. *Id.* (noting “it would make
9 little sense to require an ADA plaintiff to show that [s]he meets a qualification
10 standard that [s]he undisputedly *cannot* meet because of [her] disability and that
11 forms the very basis of [her] discrimination challenge”).

12 The parties have extensively briefed the issue of whether effective verbal
13 communication is an essential function of the HR Analyst position. Defendants
14 have produced the following evidence that effective verbal communication is an
15 essential element of the position. First, Defendants point to the HR Analyst job
16 description, which includes the following “essential job functions”: ability to assist
17 in negotiations, participate in pre-disciplinary hearings, advise managers and
18 supervisors on human resources and labor matters, assist in the planning and
19 developing of human resources policies, conduct investigations and hold meetings
20 as necessary to resolve human resources matters, conduct or coordinate human

1 resources-related training classes, and assist in the preparation and presentation of
2 human resources related matters. ECF No. 50 45, 47 (under seal). According to
3 Defendants, these tasks necessitate interactive speaking with others. ECF No. 40
4 at 11.

5 Second, Defendants point to Plaintiff's personal testimony about her
6 position. In her deposition testimony, Plaintiff admitted that the ability to
7 communicate effectively was necessary to carry out most of the "essential job
8 functions" listed on her position's job description. ECF No. 91-1 at 3-20
9 (admitting that she used some degree of verbal communication when facilitating
10 and participating in predisciplinary hearings, which involved speaking to people;
11 advising managers and supervisors, which involved conveying complex ideas in a
12 relatively easy-to-understand way; developing human resources policies, which
13 involved talking and working in a group; conducting investigations, which
14 involved interviewing witnesses; and conducting training classes, which involved
15 presenting to a room full of people).

16 Finally, Defendants point to the experience of other current HR Analysts at
17 the City, Gita George-Hatcher and Dan Daling; the current Director of Human
18 Resources, Defendant Lowe; and the former director of Human Resources, David
19
20

1 Chandler.⁸ These witnesses all agree that effective verbal communication
2 constitutes a substantial portion of the work performed by HR Analysts, ranging
3 from fifty to ninety percent. *See* ECF Nos. 42; 43; 44. Specifically, all three
4 witnesses stated that the position involves a large amount of communication face
5 to face, by phone, and by email. ECF Nos. 42 at 2; 43 at 2, 44 at 2.

6 In response, Plaintiff sets forth the following challenge to Defendants'
7 assertion that effective verbal communication is an essential function of the HR
8 Analyst position. Plaintiff attempts to distinguish effective verbal communication
9 as a *method* of performing an essential function of her position rather than an
10 essential function in itself. ECF No. 67 at 12-13. As Plaintiff notes, the job
11 description does not specifically identify "verbal communication" as an essential
12 function. *Id.* at 13. Rather, Plaintiff contends verbal communication is merely a
13 "physical requirement" of the position. *Id.* Under the "Physical Requirements"
14 section of the job description, an HR Analyst is required "to speak well enough to
15 converse on the telephone and communicate effectively with individuals and
16 groups." ECF No. 50 at 1,3 (document under seal). As such, Plaintiff argues that
17 effective verbal communication is more appropriately characterized as a

18 ⁸ Plaintiff challenges the admissibility of the declarations of Ms. George-Hatcher,
19 Mr. Daling, and Mr. Chandler. ECF No. 78. The Court addresses this challenge in
20 a subsequent section of this Order.

1 qualification standard than an essential function of the position and thus is not
2 necessary to determine whether she is a qualified individual under the ADA. *See*
3 *Bates*, 511 F.3d 974 at 990.

4 The Court finds a genuine issue of material fact exists regarding whether
5 effective verbal communication is an essential function of the HR Analyst position.
6 Although Defendants have undoubtedly established that some degree of
7 communication is necessary to carry out the essential functions of the HR Analyst
8 position, this Court is not convinced verbal communication is the only means by
9 which employees can effectively communicate. Rather, as Plaintiff contends,
10 verbal communication might merely be considered a method by which the other
11 essential functions explicitly listed in the job description are performed. On the
12 other hand, if the ability to effectively speak is necessary to carry out the essential
13 functions of the HR Analyst position, then a jury may find that oral communication
14 is an implicit part of those same essential functions and thus an essential function
15 in itself. Accordingly, because a reasonable jury could find that effective verbal
16 communication is not an essential function of the HR Analyst position, this Court
17 declines to grant Defendants' motion for summary judgment on this issue.

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19 //
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3. Ability to Perform Essential Functions with or Without Reasonable Accommodation

3 Assuming the jury does find that effective verbal communication is an
4 essential function of the HR Analyst position, the burden then falls to Plaintiff to
5 demonstrate that she was able to perform this function with or without reasonable
6 accommodations. *Samper*, 675 F.3d at 1237. Defendants contend that, given
7 Plaintiff's medically-determined speech limitations, there were no reasonable
8 accommodations that could have allowed her to perform the essential functions of
9 her position. ECF No. 40 at 12. Plaintiff, on the other hand, argues that questions
10 of fact remain regarding her ability to perform with or without accommodation.
11 ECF No. 67 at 14-15. Further, Plaintiff challenges whether Defendants properly
12 engaged in the interactive process. *Id.* at 15

Under the ADA, once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. 29 C.F.R. § 1630.2(o)(3); *Barnett v. U.S. Air.*, 228 F.3d 1105, 1114 (9th Cir. 2000) (en banc), *vacated on other grounds* by 535 U.S. 391 (2002). Employers who fail to engage in this process face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible. *Barnett*, 228 F.3d at 1116 (noting that summary judgment is

1 inappropriate if there is a genuine dispute as to whether the employer engaged in
2 good faith in the interactive process). Pursuant to the interactive process, an
3 employer is required “to ‘gather sufficient information from the applicant and
4 qualified experts as needed to determine what accommodations are necessary to
5 enable the applicant to perform the job.” *Wong v. Regents Univ. Cal.*, 192 F.3d
6 807, 818 (9th Cir. 1999) (quoting *Buckingham v. United States*, 998 F.2d 735, 740
7 (9th Cir. 1993)). The duty to accommodate “is a ‘continuing’ duty that is ‘not
8 exhausted by one effort.’” *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226, 1237
9 (9th Cir. 2001). The Ninth Circuit has explained the employer’s duty regarding the
10 interactive process as follows:

11 [T]he employer’s obligation to engage in the interactive process
12 extends beyond the first attempt at accommodation and continues
13 when the employee asks for a different accommodation or where the
14 employer is aware that the initial accommodation is failing and further
15 accommodation is needed. This rule fosters the framework of
16 cooperative problem-solving contemplated by the ADA, by
encouraging employers to seek to find accommodations that really
work, and by avoiding the creation of a perverse incentive for
employees to request the most drastic and burdensome
accommodation possible out of fear that a lesser accommodation
might be ineffective.

17 *Humphrey v. Memorial Hospitals Ass’n*, 239 F.3d 1128, 1138 (9th Cir. 2001); see
18 also EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue
19 Hardship Under the Americans with Disabilities Act* (Oct. 17, 2002), available at
20 <http://www.eeoc.gov/policy/docs/accommodation.html#intro> (“If a reasonable

1 accommodation turns out to be ineffective and the employee with a disability
2 remains unable to perform an essential function, the employer must consider
3 whether there would be an alternative reasonable accommodation that would not
4 pose an undue hardship.”). What constitutes a reasonable accommodation turns on
5 the facts and circumstances of each case. *Wong*, 192 F.3d at 819. Reasonable
6 accommodations can include “[m]odifications or adjustments to the work
7 environment, or to the manner or circumstances under which the position held or
8 desired is customarily performed, that enable an individual with a disability who is
9 qualified to perform the essential functions of that position.” 29 C.F.R. § 1630.2.

10 Here, although the evidence demonstrates Plaintiff’s verbal communication
11 was limited, factual issues remain as to whether Defendants engaged in the
12 interactive process, whether reasonable accommodations existed for Plaintiff’s
13 limitations, and whether Plaintiff could perform the essential functions of her
14 position with or without reasonable accommodation. When viewed in the light
15 most favorable to Plaintiff, the evidence shows Defendants may not have
16 sufficiently engaged in the interactive process, suggesting that the parties could
17 have discovered adequate accommodations to compensate for Plaintiff’s
18 limitations. Further, the evidence demonstrates Plaintiff was not offered
19 opportunity to perform her position with or without accommodation, thus leaving
20 uncertain whether she is a qualified individual for purposes of the ADA.

1 First, there is a genuine issue whether Defendants engaged in the interactive
2 process. As an initial matter, the parties do not dispute that Plaintiff provided
3 Defendants notice of her disability and need for accommodation. ECF Nos. 59 at
4 5; 72 at 2. Defendants contend that they engaged in a “very lengthy interactive
5 process” after being put on notice of Plaintiff’s limitations. ECF No. 87 at 9.
6 However, Defendants’ lengthy list of processes primarily includes the variations of
7 leave afforded Plaintiff. Notably absent, save for Defendants affording Plaintiff an
8 “opportunity to suggest reasonable accommodations,” ECF No. 87 at 9, was a
9 cooperative meeting between Defendants and Plaintiff that involved discovering
10 types of accommodation that would help Plaintiff perform her job. In her
11 deposition testimony, Defendant Lowe confirmed that she only had two brief
12 meetings, each lasting no longer than ten minutes, with Plaintiff between February
13 and May 2012. ECF No. 68-1 at 26-27. After the first meeting, Plaintiff went on
14 fulltime leave share and thus Defendants did not implement Plaintiff’s
15 accommodation requests. In the second meeting, which lasted merely five
16 minutes, Plaintiff provided Defendant Lowe with Dr. Gordon’s letter and proposed
17 accommodations; however, no conversation or discussion about reasonable
18 accommodations ensued either between Defendant Lowe and Dr. Gordon or
19 between Defendant Lowe and Plaintiff. Instead, Defendant Lowe scheduled
20 Plaintiff’s Fitness for Duty examination, allegedly in the effort to facilitate the

1 reasonable accommodation process, and subsequently determined medical layoff
2 with an opportunity to reevaluate was the appropriate course of action.
3 Undoubtedly, this is not the “cooperative problem-solving” framework
4 contemplated by the ADA and Ninth Circuit. *See Humphrey*, 239 F.3d at 1138.
5 Because a reasonable jury could find that Defendants did not adequately engage in
6 the interactive process, this Court declines to grant summary judgment on this
7 issue.

8 Second, there is a genuine issue regarding the extent of Plaintiff’s limitations
9 and whether Plaintiff was capable of performing the duties of her job without
10 reasonable accommodation. The parties seem to dispute the characterization of the
11 various medical opinions concerning the extent of Plaintiff’s speech limitations.

12 Regarding Dr. Lanstberger’s opinion, Defendants contend the opinion of a
13 board certified occupational medicine specialist—who ultimately opined Plaintiff
14 would be unable to perform essential functions of her position—should be
15 dispositive. On the other hand, Plaintiff notes Dr. Lantsberger merely indicated
16 Plaintiff presented “with occasional word finding difficulty and articulation . . .
17 difficulty” and her speech was “mildly to moderately dysarthric,” creating doubt
18 as to whether she was truly unable to adequately perform her job. ECF No. 67 at
19 15. Further, Plaintiff challenges Dr. Lantsberger’s ultimate opinion as lacking
20 credibility. *Id.* at 19-20. Although Dr. Lanstberger ultimately opined Plaintiff was

1 unable to perform her essential work functions, with or without accommodation,
2 her original findings—based on the job description that purportedly establishes
3 verbal communication as an essential function of Plaintiff's position—opined that
4 Plaintiff would be able to return to work. It was only after Defendant Lowe
5 contacted Dr. Lantsberger, “clarifying” that ninety percent of the HR Analyst’s
6 position involves interactive verbal communication and suggesting a medical
7 layoff, ECF No. 50 at 55, that Dr. Lantsberger determined Plaintiff would be
8 incapable of performing the essential functions required of her position.

9 Regarding Ms. Kettleson’s opinion, Defendant highlights Ms. Kettleson’s
10 deposition testimony in which she stated Plaintiff was having difficulty throughout
11 her treatment with “higher level language tasks” and verbal fluency. ECF No. 40
12 at 115. Plaintiff, on the other hand, interpreted Ms. Kettleson’s assessment as
13 merely indicating that Plaintiff was not completely capable of her past speech
14 abilities but could communicate in a lot of scenarios and would require more
15 therapy “to return to work in 100% of the way she was before.” ECF No. 67 at 15.
16 Defendants do not suggest that Plaintiff’s position mandated perfect
17 communication skills; thus, a genuine issue remains as to the extent of Plaintiff’s
18 limitations and whether her communication skills were sufficient to perform her
19 job. Accordingly, because a reasonable jury could find that Plaintiff could perform
20

1 her job without accommodation, the Court declines to grant summary judgment on
2 this issue.

3 Third, even assuming Plaintiff was unable to perform the essential functions
4 of her job without accommodation, there is a genuine issue regarding whether a
5 reasonable accommodation existed which would enable Plaintiff to perform her
6 essential job functions *with* accommodation. Defendants contend, given Plaintiff's
7 limitations, no reasonable accommodation could have been identified that would
8 have allowed Plaintiff to perform her essential job functions. ECF No. 87 at 9-10.
9 However, as discussed above, this Court questions whether Defendants adequately
10 engaged in the interactive process and explored possible accommodations. For
11 instance, Plaintiff's briefing suggests numerous accommodations for her speech
12 limitations, such as access to TTY telephone or similar devices, as well as the use
13 of other methods of communication to supplement verbal communication, such as
14 emailing and instant messaging. ECF No. 67 at 18-19. Further, both Drs. Gordon
15 and Castleman stated that Plaintiff should be afforded the opportunity to return to
16 work, noting that no one could know with certainty whether Plaintiff was capable
17 of fulfilling her work responsibilities without allowing her the opportunity to try.
18 ECF No. 52 at 40, 78. Defendant Lowe did not permit Plaintiff opportunity to
19 attempt to perform her job with any of the accommodations originally requested or
20 subsequently recommended by Dr. Gordon, believing Plaintiff would not be able to

1 perform the essential functions of the position even with these accommodations.
2 ECF No. 49 at 65-67. In line with the Ninth Circuit's reasoning in *Humphrey*,
3 Plaintiff arguably should have been afforded opportunity to return to work to
4 ascertain the effectiveness of the proposed accommodations. *Humphrey*, 239 F.3d
5 at 1138. If these accommodations proved ineffective, the parties would then need
6 to explore the effectiveness of alternative accommodations. Because Plaintiff was
7 not afforded this opportunity, a genuine issue remains whether she was capable and
8 thus a qualified individual under the ADA.

9 In conclusion, genuine issues remain as to whether (1) effective verbal
10 communication is an essential function of the HR Analyst position; (2) Defendants
11 adequately engaged in the interactive process; (3) Plaintiff's limitations prevented
12 her from performing the essential functions of her position without
13 accommodation; and (4) assuming Plaintiff was incapable of performing the
14 essential functions without accommodation, reasonable accommodation existed
15 that would allow Plaintiff to perform the essential functions of the HR Analyst
16 position. Accordingly, Defendants motion for summary judgment on Plaintiff's
17 failure to accommodate claims under the ADA and WLAD (ECF No. 40) is

18 **DENIED.**

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1 **B. Fitness for Duty Examination Under the ADA**

2 Plaintiff contends the Fitness for Duty examination, scheduled by Defendant
3 Lowe, gives rise to a separate cause of action under the ADA because this
4 examination was not shown to be job-related and consistent with business
5 necessity. ECF No. 67 at 25. Plaintiff relies on the following two grounds: (1)
6 there was no business necessity in ordering Plaintiff to submit to an additional
7 examination considering Plaintiff already provided Defendants with documentation
8 from her treating physician, Dr. Gordon; and (2) the examination, purportedly
9 meant to test Plaintiff's communication limitations, involved no specific testing of
10 these limitations. *Id.* at 26. Defendants counter that this examination was job-
11 related and consistent with business necessity because it addressed whether
12 Plaintiff was able to adequately perform her job given her speech limitations at that
13 time. ECF Nos. 40 at 9; 87 at 10.

14 Under 42 U.S.C. § 12112(d)(4)(A), an employer may require a medical
15 examination to determine whether an employee is disabled if such examination "is
16 shown to be job-related and consistent with business necessity." *Brownfield v.*
17 *City of Yakima*, 612 F.3d 1140, 1145 (9th Cir. 2010) (quoting 42 U.S.C. §
18 12112(d)(4)(A)). Although the business necessity standard is "quite high," the
19 standard "may be met even before an employee's work performance declines if the
20 employer is faced with significant evidence that could cause a reasonable person to

1 inquire as to whether an employee is still capable of performing his job.” *Id.* at
2 1146. “The employer bears the burden of demonstrating business necessity.” *Id.*
3 EEOC regulations allow an employer to “require a medical examination (and/or
4 inquiry) of an employee that is job-related and consistent with business necessity.”
5 29 C.F.R. § 1630.14(c). As a result, supervisors may then be informed by the
6 medical examination “regarding necessary restrictions on the work or duties of the
7 employee and necessary accommodations.” *Id.* § 1630.14(c)(1)(i).

8 Here, even considering the high standard needed to demonstrate business
9 necessity, there is no genuine issue of material fact regarding whether Defendants’
10 use of a Fitness for Duty examination was appropriate. Although Dr. Gordon
11 opined that Plaintiff was capable of returning to work provided she be afforded
12 certain accommodations, Defendant Lowe believed the recommended
13 accommodations were insufficient to account for Plaintiff’s speech limitations.
14 As of the date Defendant Lowe scheduled the examination, Dr. Gordon’s
15 evaluation was the only medical assessment. Pursuant to the City’s policy and
16 practice, Defendant Lowe thought it prudent to have Dr. Lantsberger, of
17 Occupational Medical Associates, exam Plaintiff for a second opinion in order to
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1 assess Plaintiff's ability to return to work⁹ and presumably identify possible
2 accommodations. ECF Nos. 40 at 9; 45-1 at 51; 87 at 10. Under EEOC's
3 regulations, employers are allowed to require medical examinations, such as
4 Fitness for Duty examinations, in an effort to comply with the interactive process
5 and discover "necessary accommodations." 29 C.F.R. § 1630.14(c)(1)(i).
6 Considering Defendants' duties under the ADA and the fact that Plaintiff already
7 informed Defendants of her disability, this examination was undoubtedly job-
8 related and a business necessity. This Court finds that Defendants have satisfied
9 their burden that the Fitness for Duty Examination was job-related and consistent
10 with business necessity. Accordingly, Defendants' summary judgment on this
11 claim (ECF No. 40) is **GRANTED**.

12 **C. Disparate Treatment Under the ADA & WLAD**

13 In addition to her failure to accommodate claims, Plaintiff has asserted
14 claims under the ADA and the WLAD for disparate treatment on the basis of a
15 disability. Defendants have moved for summary judgment on these claims on the
16 grounds that Plaintiff has not identified a similarly situated employee who was
17 treated more favorably, and the City had a legitimate, non-discriminatory reason

18 ⁹ Contrary to Plaintiff's assertion, Dr. Lantsberger's examination did generally
19 assess Plaintiff's speech, even if there was no "specific" test employed. *See* ECF
20 No. 52 at 45-59 (document under seal).

1 for placing Plaintiff on medical layoff: Plaintiff could not perform the essential
 2 functions of her position.¹⁰ ECF No. 40 at 18. Plaintiff has moved for summary
 3 judgment on her WLAD claim on the grounds that she has satisfied the *prima facie*
 4 elements. ECF No. 58 at 23-26.

5 To prove a claim for disparate treatment under the ADA, a plaintiff may
 6 present direct evidence demonstrating that the employer's adverse employment
 7 decision was "because of" the employee's disability. *See McGinest v. GTE Serv.*
 8 *Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004); *Daniel v. Boeing Co.*, 764 F.Supp. 2d
 9 1233, 1240 (W.D. Wash. 2011) ("Plaintiff may establish a violation of the ADA by
 10 providing direct evidence of discrimination or by making a *prima facie* showing of
 11 discriminatory intent."). Alternatively, a plaintiff may assert her ADA claim by
 12 providing indirect evidence of discrimination under the familiar *McDonnell*
 13 *Douglas* burden-shifting framework. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50
 14 n. 3 (2003); *Chuang v. Univ. Cal. Davis*, 225 F.3d 1115, 1123 (9th Cir. 2000);
 15 *Domingo v. Boeing Employee's Credit Union*, 124 Wash. App. 71, 77 (2004)
 16 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

17 Under *McDonnell Douglas*, a plaintiff alleging disparate treatment must first
 18 establish a *prima facie* case of discrimination. Specifically, a plaintiff must show

19 ¹⁰ As discussed above, this Court dismisses Plaintiff's ADA claim for disparate
 20 treatment as against Defendant Lowe, an individual.

1 that he or she (1) belongs to a protected class; (2) was qualified for the position; (3)
2 was subject to an adverse employment action; and (4) similarly situated employees
3 outside the protected class were treated more favorably.¹¹ *Chuang*, 225 F.3d at
4 1123; *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 150 (2004) (en banc). The
5 burden then shifts to the employer to articulate a legitimate, non-discriminatory
6 reason for taking the challenged action. *Chuang*, 225 F.3d at 1123. Provided that
7 the employer can articulate such a reason, the burden then shifts back to the
8 plaintiff to demonstrate that the proffered reason was a mere pretext for unlawful
9 discrimination. *Id.* at 1123-24. “As a general matter, the plaintiff in an

10 ¹¹ Another line of Washington case law lists the following as the elements for a
11 prima facie case for disability discrimination: employee was (1) disabled, (2)
12 subject to an adverse employment action; (3) doing satisfactory work; and (4)
13 discharged under circumstances that raise a reasonable inference of unlawful
14 discrimination. *Brownfield v. City of Yakima*, 178 Wash. App. 850, at 873 (2014);
15 *Callahan v. Walla Walla Hous. Auth.*, 126 Wash. App. 812, 819-20 (2005).
16 Plaintiff moves for summary judgment under this framework. However, based on
17 the most recent Washington Supreme Court opinion discussing the WLAD, the
18 prima facie case announced in *McDonnell Douglas* appears to be the prevailing
19 framework. See *Scrivener v. Clark College*, 2014 WL 4648179, at * 3 (Wash.
20 Sept. 18, 2014) (en banc).

1 employment discrimination action need produce very little evidence in order to
2 overcome an employer's motion for summary judgment." *Id.* at 1124.

3 Viewing the facts in the light most favorable to Plaintiff, this Court finds
4 there is a genuine issue of material fact regarding whether Plaintiff suffered
5 disparate treatment. First, Plaintiff presents persuasive direct evidence
6 demonstrating that Defendants' decision to place her on medical layoff was
7 "because of" her disability. Defendant Lowe's communications with Dr.
8 Lantsberger, in which she expressed discomfort with allowing someone with
9 Plaintiff's limitations to return to work and suggested medical layoff as an
10 appropriate course of action, provide some evidence that Defendants' adverse
11 employment decision was "because of" Plaintiff's speech-related disabilities.
12 Most significantly, in her response to Dr. Lantsberger's assessment that Plaintiff
13 was fit to return to work based on her Fitness for Duty examination, Defendant
14 Lowe stated the following:

15 I also thought about your suggestion that we put [Plaintiff] back to
16 work and see what happens. If the workload cannot be handled, takes
17 too long to complete, or complaints are received, then we would send
18 her back to OMA for further evaluation. I am very uncomfortable
about this scenario in putting her in a situation like this, as well as my
employees.

19 ECF Nos. 49-4 at 59; 52 at 62 (document under seal); 59 at 8-9. A jury could
20 reasonably conclude that this constitutes direct evidence that Defendants placed

1 Plaintiff on medical layoff “because of” her disability.

2 Second, Plaintiff has presented indirect evidence of disparate treatment.

3 Defendants do not dispute that Plaintiff is a disabled person within the meaning of
4 the ADA and that she suffered an adverse employment action when they placed her
5 on medical layoff status. Thus, two of the four elements of a prima facie case for
6 disparate treatment are conceded. As to whether Plaintiff was “qualified” for the
7 position, based on this Court’s previous discussion of Plaintiff’s failure to
8 accommodate claims, genuine issues remain whether Plaintiff was qualified to
9 perform the essential functions of her job with or without accommodation. Finally,
10 Plaintiff has presented some evidence indicating that other similarly-situated City
11 employees were treated more favorably. Regarding use of intermittent leave share,
12 the HR department allowed at least one other employee (who was subject to the
13 same type of employment as Plaintiff) use of intermittent leave share. ECF Nos.
14 68-1 at 12-13; 70 at 3. Considering that Plaintiff’s contract did not actually
15 preclude intermittent leave share and the final determination whether to grant
16 intermittent leave share rested with the HR department, ECF Nos. 68-1 at 20; 70 at
17 2, a reasonable jury could conclude that other similarly-situated employees were
18 treated more favorably than Plaintiff. Therefore, Plaintiff has established a prima
19 facie case and the burden shifts to Defendants to provide a legitimate, non-
20 discriminatory explanation for their decision to place Plaintiff on medical layoff.

1 There is a genuine issue of material fact as to whether Defendants
2 demonstrated a legitimate, nondiscriminatory reason for Plaintiff's termination.
3 The reason given by Defendants must actually constitute a valid nondiscriminatory
4 explanation; that is, "one that 'disclaims any reliance on the employee's disability
5 in having taken the employment action.'" *Dark v. Curry Cnty.*, 451 F.3d 1078,
6 1084 (9th Cir. 2006) (explaining that with few exceptions, "conduct resulting from
7 a disability is considered to be part of the disability, rather than a separate basis for
8 termination") (internal citation omitted). Defendants maintain that because
9 Plaintiff could not perform her essential job duties, there was nothing unlawful or
10 inappropriate about placing her on medical layoff status. However, Defendants
11 cannot rationally state this explanation "disclaims any reliance on [Plaintiff's]
12 disability." *Id.* at 1084.

13 Even if Defendants have put forth a legitimate non-discriminatory reason,
14 Plaintiff has raised sufficient factual issues regarding whether Defendant City's
15 explanation is merely pretext for unlawful discrimination. Most significantly,
16 Defendant Lowe's communications with Dr. Lantsberger, in which she expressed
17 discomfort with allowing someone with Plaintiff's limitations to attempt to handle
18 the workload, provide some evidence that the termination decision was
19 discriminatorily based. Further, there are still factual issues regarding Plaintiff's
20 work performance following her stroke. Although Defendants note that Plaintiff's

1 performance was severely limited, Plaintiff contends that any limitations in her
2 work were because of Defendant Lowe's failure or refusal to assign her greater
3 work assignments. ECF No. 83 at 4-5. Therefore, a reasonable jury could find that
4 Plaintiff suffered disparate treatment because of her disability. Accordingly,
5 Defendants' and Plaintiff's motions for summary judgment (ECF Nos. 40, 58)
6 regarding these claims are **DENIED**.

7 **D. Washington State Law Claims**

8 1. Wrongful Discharge in Violation of Public Policy

9 Defendants move for summary judgment on Plaintiff's wrongful discharge
10 claim on the grounds that no discrimination occurred, and even if the Court does
11 find discrimination, Plaintiff fails to satisfy the *prima facie* elements of the tort.
12 ECF No. 40 at 22-23. Plaintiff counters that a genuine issue remains as to whether
13 Defendants failed to respond appropriately to Plaintiff's request for disability
14 accommodation. ECF No. 67 at 27-28.

15 To state a claim for wrongful termination in violation of public policy, a
16 plaintiff must show the following: "(1) the existence of a clear public policy (the
17 *clarity* element); (2) that discouraging the conduct in which [he or she] engaged
18 would jeopardize the public policy (the *jeopardy* element); (3) that the public-
19 policy-linked conduct caused the dismissal (the *causation* element); and finally (4)
20 that the defendant has not offered an overriding justification for the dismissal (the

1 *absence of justification element.” Cudney v. ALSICO, Inc.*, 172 Wash.2d 524, 529
2 (2011) (quoting *Gardner v. Loomis Armored, Inc.*, 128 Wash.2d 931, 941(1996))
3 (internal quotation marks omitted). When analyzing a claim for wrongful
4 discharge, courts are instructed that the tort, a limited exception to Washington’s
5 general rule of at-will employment, is “narrow and should be applied cautiously.”
6 *Id.* at 530 (citation omitted).

7 Plaintiff relies on the WLAD as the basis for her wrongful discharge claim.
8 Although WLAD establishes a clear mandate of public policy, *see e.g., Roberts v.*
9 *Dudley*, 140 Wash.2d. 58, 63 (2000), Plaintiff has not satisfied the jeopardy
10 element of the claim. The WLAD provides for a cause of action itself—it does not
11 support a second cause of action for wrongful discharge as there is no additional
12 “jeopardy” not already protected by the statute. Although the Washington
13 Supreme Court recently held in *Piel v. City of Fed. Way*, 177 Wash.2d 604, 614
14 (2013), that that the jeopardy analysis of a wrongful discharge claim—when the
15 claim is alleged alongside an otherwise comprehensive statutory scheme—should
16 not necessarily foreclose relief under the common law tort, *Piel* merely requires
17 courts to evaluate a wrongful discharge claim “in light of its particular context” to
18 determine whether the available statutory remedy is inadequate. *Piel*, 177
19 Wash.2d at 617. For instance, in *Bennett v. Hardy*, 113 Wash.2d 912, 924 (1990)
20 (en banc), the court allowed plaintiff’s wrongful discharge claim, based on the

1 public policy found in WLAD, to proceed despite this statutory basis because the
2 underlying scheme did not provide Plaintiff an adequate remedy. Because Plaintiff
3 has not demonstrated, in this particular context, that WLAD is “inadequate to
4 protect public policy,” *see Cudney*, 172 Wash.2d at 530-31, Defendants’ motion
5 for summary judgment on this claim is **GRANTED**.

6 2. Emotional Distress

7 Defendants move for summary judgment on Plaintiff’s intentional and
8 negligent infliction of emotional distress claims. ECF No. 40 at 23-24. Regarding
9 Plaintiff’s intentional infliction of emotional distress claim, Defendants move for
10 summary judgment on the ground that none of the conduct alleged appears to rise
11 to the extreme degree of conduct required for an outrage claim. *Id.* Plaintiff does
12 not respond to this challenge. *See* ECF No. 67. Regarding Plaintiff’s negligent
13 infliction of emotional distress claim, Defendants move for summary judgment on
14 the ground that Plaintiff’s allegations fail to establish negligent conduct. ECF No.
15 40 at 24.

16 i. *Intentional Infliction of Emotional Distress*

17 To establish the tort of outrage, a plaintiff must show “(1) extreme and
18 outrageous conduct, (2) intentional or reckless infliction of emotional distress, and
19 (3) severe emotional distress on the part of the plaintiff.” *Reid v. Pierce Cnty.*, 136
20 Wash.2d 195, 202 (1998). It is not enough that the defendant acted with

1 tortious or criminal intent, nor will liability extend “to mere insults, indignities,
2 threats, annoyances, petty oppressions, or other trivialities.” *Grimsby v. Samson*,
3 85 Wash.2d 52, 59 (1975). Rather, the conduct must be “so outrageous in
4 character, and so extreme in degree, as to go beyond all possible bounds of
5 decency, and to be regarded as atrocious, and utterly intolerable in a civilized
6 community.” *Id.* The question of whether defendant’s conduct was sufficiently
7 outrageous is normally left to the jury. *Dicomes v. State*, 113 Wash.2d 612, 630
8 (1989). However, “it is initially for the court to determine if reasonable minds
9 could differ on whether the conduct was sufficiently outrageous to result in
10 liability.” *Id.* Factors the court may consider in determining whether the conduct is
11 sufficiently outrageous include: the position occupied by defendant; whether the
12 plaintiff was particularly susceptible to emotional distress and if defendant knew
13 that fact; the degree of the severity of the emotional distress as opposed to
14 annoyance, inconvenience or embarrassment; and “the actor must be aware that
15 there is a high probability that his conduct will cause severe emotional distress and
16 he must proceed in a conscious disregard of it.” *Phillips v. Hardwick*, 29 Wash.
17 App. 382, 388 (1981).

18 Here, Plaintiff bases her tort of outrage on the allegations in her Complaint,
19 essentially the factual allegations that support her wrongful termination and
20 discrimination claims. Even under the high bar set by the Washington Supreme

1 Court, Plaintiff has not made sufficient allegations supporting a tort of outrage for
2 her termination. Assuming all Plaintiff's factual allegations are true, the Court
3 does not find conduct "utterly intolerable in a civilized community." *Grimsby*, 85
4 Wash.2d at 59. Accordingly, Defendants motion for summary judgment on this
5 claim is **GRANTED**.

6 *ii. Negligent Infliction of Emotional Distress*

7 To establish the tort of negligent infliction of emotional distress, a plaintiff
8 must show that (1) the defendant engaged in negligent conduct; (2) the plaintiff
9 suffered serious emotional distress; and (3) the defendant's negligent conduct was
10 the cause of the plaintiff's serious emotional distress. *See Hegel v. McMahon*, 136
11 Wash.2d 122, 135 (1988). "As with any claim sounding in negligence, where a
12 plaintiff brings suit based on negligent infliction of emotional distress 'we test the
13 plaintiff's negligence claim against the established concepts of duty, breach,
14 proximate cause, and damage or injury.'" *Snyder v. Med. Serv. Corp. of E. Wash.*,
15 145 Wash.2d 233, 243 (2001). In addition to the traditional elements of
16 negligence, a plaintiff must show an "objective symptomology" that is susceptible
17 to a medical diagnosis. *Kloepfel v. Bokor*, 149 Wash.2d 192, 196-97 (2003) (en
18 banc).

19 The Washington courts have repeatedly noted the limited place negligent
20 infliction of emotional distress claims have in the employment context. As the

1 Washington Supreme Court aptly stated, “[t]here is no duty for an employer to
2 provide employees with a stress free workplace.” *Snyder*, 145 Wash.2d at 243.
3 “[A]bsent a statutory or public policy mandate, employers do not owe employees a
4 duty to use reasonable care to avoid the inadvertent infliction of emotional distress
5 when responding to workplace disputes.” *Id.* at 244 (citing *Bishop v. State*, 77
6 Wash. App. 228, 244 n.5 (1995)); *see also Lords v. N. Auto. Corp.*, 75 Wash. App.
7 589, 595 (1994) (absent a “clear mandate of public policy,” an employee has no
8 cause of action against his or her employer for negligent infliction of emotional
9 distress when employment at will is terminated); *Johnson v. Dep’t of Soc. &*
10 *Health Servs.*, 80 Wash. App. 212 (1996) (holding employers have no duty to
11 avoid infliction of emotional distress on employees when responding to
12 employment issues). Rather, an employer owes a duty only to those who are
13 foreseeably endangered by its conduct and only as to those risks or hazards whose
14 likelihood made the conduct unreasonably dangerous. *Id.* at 245 (“Conduct is
15 unreasonably dangerous when its risks outweigh its utility.”).

16 Here, Plaintiff fails to establish that Defendants owed her a duty and
17 subsequently breached that duty. Plaintiff bases her claim of negligent infliction of
18 emotional distress on the allegations in her Complaint, essentially the factual
19 allegations that support her wrongful termination and discrimination claims.
20 Specifically, Plaintiff asserts that because Defendants terminated Plaintiff despite

1 her requests for accommodation and medical recommendations advising that she
2 could perform her job functions, she suffered emotional distress, susceptible to
3 medical diagnosis. ECF No. 67 at 29 (citing to the expert report of Dr. Duane
4 Green, who opined that Plaintiff would have experienced an increase in depression
5 and anxiety symptoms as a result of her medical layoff if the work-related events
6 occurred exactly as she described). Plaintiff offers no evidence to show a genuine
7 issue of material fact that there was a duty owed and a subsequent breach. Rather,
8 Plaintiff merely accuses Defendants of inflicting emotional harm when they
9 terminated her. Such allegations in the employment context do not support a cause
10 of action for this tort. Accordingly, Defendants' motion for summary judgment on
11 this claim (ECF No. 40) is **GRANTED**.

12 3. Unpaid Wages Claim

13 Defendants move for summary judgment on Plaintiff's unpaid wage and
14 hour claim on the grounds that the cause of action is not ripe. ECF No. 40 at 25.
15 Under RCW § 49.52.050(2) an employer is guilty of a misdemeanor if it "willfully
16 and with intent to deprive the employee of any part of his or her wages, shall pay
17 any employee a lower wage than the wage such employer is obligated to pay such
18 employee by statute, ordinance, or contract." Wash. Rev. Code § 49.52.050(2).
19 This statute is to be construed liberally to advance the intent of the Legislature to
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1 protect employee wages and assure payment. *Schilling v. Radio Holdings, Inc.*,
2 136 Wash.2d 152, 159 (1998).

3 The critical determination in these cases is whether non-payment is
4 “willful,” in other words, when it is the “result of knowing and intentional action
5 by the employer, rather than a bona fide dispute as to the obligation of payment.”
6 *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1050 (9th Cir. 1995); *see also*
7 *Schilling*, 136 Wash.2d at 161 (to qualify as a “bona fide” dispute it must be “fairly
8 debatable” as to whether an employment relationship exists or whether the wages
9 must be paid). Washington courts have found that an employer does not willfully
10 withhold wages under the meaning of this statute where he has a “bona fide belief
11 that he is not obligated to pay them.” *See e.g., McAnulty v. Snohomish School*
12 *Dist. No. 201*, 9 Wash. App. 834, 838 (1973) (finding no evidence in the record
13 that employer did not genuinely believe that employee was legitimately discharged
14 and that wages could be properly discontinued).

15 Generally, the issue of whether the withholding of wages was “willful” is a
16 question of fact, however, if reasonable minds could reach but one conclusion from
17 those facts, the issue may be decided as a matter of law. *Moore v. Blue Frog*
18 *Mobile, Inc.*, 153 Wash. App. 1, 8 (2009). Plaintiff identifies no specific facts
19 showing a genuine issue of material fact exists as to whether Defendants
20 knowingly and intentionally withheld wages. On the contrary, the record before

1 the Court indicates that Defendants had a genuine belief that they were not
2 obligated to pay Plaintiff after her employment was terminated. *See McAnulty*, 9
3 Wash. App. at 838. Even when viewed in the light most favorable to Plaintiff, the
4 Court finds that a reasonable jury could only reach the conclusion that there was no
5 violation of RCW § 49.52.050(2). Accordingly, Defendants' motion for summary
6 judgment on this claim (ECF No. 40) is **GRANTED**.

7 4. Defendant City's Vicarious Liability

8 Defendant City moves for summary judgment on Plaintiff's discrete
9 vicarious liability cause of action. Vicarious liability, otherwise known as the
10 doctrine of *respondeat superior*, imposes liability on an employer for the torts of
11 an employee who is acting on the employer's behalf. *Niece v. Elmview Group*
12 *Home*, 131 Wash.2d 39, 48 (1997). It is clear Plaintiff seeks to hold both employer
13 and employee liable where she is allowed to do so. Because there are genuine
14 issues of material fact surrounding Plaintiff's ADA and WLAD claims, a jury
15 could still impute liability to Defendant City based on Defendant Lowe's actions.
16 Accordingly, while Defendant City's motion for summary judgment on this
17 independent cause of action (ECF No. 40) is **GRANTED**, the Defendant City may
18 still be held vicariously liable for the remaining causes of action.

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1 **II. Motions to Exclude Expert Witnesses**

2 Expert witness testimony is governed by Federal Rule of Evidence 702,
3 which provides:

4 A witness who is qualified as an expert by knowledge, skill, experience,
5 training, or education may testify in the form of an opinion or otherwise if:
6 (a) the expert's scientific, technical, or other specialized knowledge will help
the trier of fact to understand the evidence or to determine a fact in issue; (b)
the testimony is based on sufficient facts or data; (c) the testimony is the
product of reliable principles and methods; and (d) the expert has reliably
applied the principles and methods to the facts of the case.

8 Fed. R. Evid. 702.

9 In *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court directed
10 trial courts to perform a “gatekeeping” function to ensure that expert testimony
11 conforms to Rule 702’s admissibility requirements. 509 U.S. 579, 597 (1993).
12 *Daubert* identifies four non-exclusive factors a court may consider in assessing the
13 relevance and reliability of expert testimony: (1) whether a theory or technique has
14 been tested; (2) whether the theory or technique has been subjected to peer review
15 and publication; (3) the known or potential error rate and the existence and
16 maintenance of standards controlling the theory or technique’s operation; and (4)
17 the extent to which a known technique or theory has gained general acceptance
18 within a relevant scientific community. *Id.* at 593-94. These factors are not to be
19 applied as a “definitive checklist or test,” but rather as guideposts which “may or
20 may not be pertinent in assessing reliability, depending on the nature of the issue,

1 the expert's particular expertise, and the subject of his testimony." *Kumho Tire*
2 *Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999). The ultimate objective is to
3 "make certain that an expert, whether basing testimony upon professional studies
4 or personal experience, employs in the courtroom the same level of intellectual
5 rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152.
6 The district court has "broad discretion in determining the admissibility of
7 evidence and considerable leeway in determining the reliability of particular expert
8 testimony." *Id.*

9 "It is well-established . . . that expert testimony concerning an ultimate issue
10 is not per se improper." *Hangarter v. Provident Life & Ins. Co.*, 373 F.3d 998, at
11 1016 (9th Cir. 2004) (internal citation omitted). However, "an expert witness
12 cannot give an opinion as to her legal conclusion, *i.e.*, an opinion on the ultimate
13 issue of law." *Id.* (citation omitted). Expert opinion on pure issue of law is
14 inadmissible under Rule 702. *Aguilar v. Int'l Longshoremen's Union Local No.*
15 10, 966 F.2d 443, 447 (9th Cir. 1992). Rather, "instructing the jury as to the
16 applicable law 'is the distinct and exclusive province' of the court." *Hangarter*,
17 373 F.3d at 1016 (citing *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir.
18 1993)).

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1 **A. Plaintiff's Motion to Exclude Defendants' Expert Judith Clark**

2 Defendants have proffered Ms. Clark as an expert in the field of human
3 resources. Plaintiff moves to exclude Ms. Clark's testimony on grounds that her
4 testimony contains inadmissible legal assertions and speculative, unreliable, and
5 conjectural opinions. ECF No. 46.

6 Having reviewed the record, this Court finds that Ms. Clark is a reliable
7 expert based on her knowledge, training, and experience in the field of human
8 resources. ECF No. 49-5 at 2-3, 15-19. Ms. Clark has more than forty years of
9 experience in human resources, has achieved certification in the field, and has
10 served as an expert witness on these matters in numerous other cases. ECF No. 49-
11 5 at 2-3, 15-19. Further, this Court finds that Ms. Clark is permitted to rely on her
12 personal experience as well the information provided to her. Fed. R. Evid. 703;
13 *Kumho Tire Co.*, 526 U.S. at 148. However, this Court agrees that much of Ms.
14 Clark's anticipated testimony invades the province of the judge and jury. Ms.
15 Clark stands to testify about whether Defendants complied with the
16 accommodation and interactive process and whether Plaintiff was able to perform
17 the essential functions of her position. ECF No. 49-5 at 7-11. Such testimony is
18 improper because it offers "an opinion on an ultimate issue of law" which is the
19 exclusive province of the jury. *Hangarter*, 373 F.3d at 1016; *Hollen v. Chu*, 2013
20 WL 5306594, at *5 (E.D. Wash. Sept. 19, 2013). Further, Ms. Clark's testimony

1 regarding the definition of legal terms, such as qualified individual, reasonable
2 accommodation, and interactive process (ECF No. 49-5 at 7-8), is improper
3 because it instructs the jury as to the applicable law, which is the exclusive
4 province of the court. *Hangarter*, 373 F.3d at 1016.

5 In order to avoid invading the province of the judge and jury, Ms. Clark
6 should limit her testimony to the following issues: (1) what the accommodation
7 and interactive process look like, including the proper role of administrators; (2)
8 examples of reasonable accommodations; (3) how employers typically engage in
9 the process of accommodating disabled employees; and (4) what steps Defendants
10 took in the accommodation and interactive process. By limiting her opinion to
11 these issues, Ms. Clark can assist the jury in deciding the ultimate legal issues—
12 whether Defendant City complied with the standards set forth in the ADA—
13 without directly testifying to that issue. Accordingly, Plaintiff's motion to exclude
14 Ms. Clark's testimony (ECF No. 46) is **DENIED, in part**, insofar as it moves to
15 exclude Ms. Clark from testifying, and **GRANTED, in part**, insofar as it moves to
16 exclude Ms. Clark's inadmissible opinion testimony.

17 **B. Defendants' Motion to Exclude Expert Testimony of Jennifer Morphis**

18 Plaintiff has proffered Ms. Morphis as an expert in vocational issues and
19 disability accommodations. Defendants move to exclude the expert testimony of
20 Jennifer Morphis, a vocational rehabilitation counselor, on grounds that her

1 testimony does not meet the *Daubert* standards of reliability and relevance. ECF
2 No. 54 at 4. Specifically concerning relevance, Defendants point to two opinions
3 set forth by Ms. Morphis: that Plaintiff would be able to perform the essential tasks
4 and functions of her job with reasonable accommodation; and that Plaintiff would
5 be able to successfully perform her former position as an HR Analyst full time.
6 ECF No. 76 at 6.

7 This Court finds that Ms. Morphis is a reliable expert based on her
8 knowledge, training, and experience in vocational and rehabilitation issues. Ms.
9 Morphis has over thirty years of practical experience in the rehabilitation field.
10 ECF No. 57 at 14 (document under seal). This Court also finds that Ms. Morphis'
11 opinions, based on her vocational and rehabilitation expertise, will be helpful to the
12 jury in understanding and determining the facts at issue. Further, this Court finds
13 that Ms. Morphis is permitted to rely on her personal experience as well as her
14 review of the Plaintiff's medical records. Fed. R. Evid. 703; *Kumho Tire Co.*, 526
15 U.S. at 148. However, this Court agrees that Ms. Morphis' opinions invade the
16 province of the jury. Ms. Morphis stands to testify that Plaintiff could adequately
17 perform her job duties with reasonable accommodation. ECF No. 57 at 19
18 (document under seal). Such testimony is improper because it offers "an opinion
19 on an ultimate issue of law" which is the exclusive province of the jury.
20 *Hangarter*, 373 F.3d at 1016.

1 In order to avoid invading the province of the jury, Ms. Morphis should limit
2 her testimony to the following issues: (1) which accommodations can be used and
3 are regularly used with individuals with limitations similar to Plaintiff's; and (2)
4 the extent to which these accommodations would help an individual perform the
5 essential functions of the HR Analyst position. By limiting her testimony to these
6 issues, Ms. Morphis can assist the jury in deciding the ultimate legal issues—
7 whether Plaintiff was a qualified individual for purposes of the ADA—without
8 directly testifying to that issue. Accordingly, Plaintiff's motion to exclude Ms.
9 Morphis' testimony (ECF No. 54) is **DENIED, in part**, insofar as it moves to
10 exclude Ms. Morphis from testifying, and **GRANTED, in part**, insofar as it moves
11 to exclude Ms. Morphis' inadmissible opinion testimony.

12 **III. Motion to Strike Declarations**

13 Plaintiff moves to strike the declarations of Gita George-Hatcher (ECF No.
14 42), Dan Daling (ECF No. 43), and David Chandler (ECF No. 44) on the grounds
15 that all three declarations provide inadmissible opinion testimony. ECF No. 78.
16 Specifically, Plaintiff challenges the declarations as providing “unsubstantiated and
17 conclusory” opinions regarding Plaintiff's former HR position that are not based
18 on personal knowledge; and “purported ‘expert’ testimony and/or inappropriate lay
19 opinion testimony” regarding whether reasonable accommodations could have
20 helped Plaintiff perform the essential functions of her job. *Id.* at 4-5.

1 As an initial matter, this Court finds the statements in these declarations
2 regarding the essential functions of the HR Analyst position are based on personal
3 knowledge, which Defendants have sufficiently established. Under the Federal
4 Rules of Evidence, “[s]upporting and opposing affidavits shall be made on
5 personal knowledge, shall set forth such facts as would be admissible in evidence,
6 and shall show affirmatively that the affiant is competent to testify to the matters
7 stated therein.” Fed. R. Civ. P. 56(e). Ms. George-Hatcher and Mr. Daling hold
8 the same HR position as Plaintiff did and worked under the same supervisors as
9 Plaintiff; thus, their statements regarding the essential functions of the HR Analyst
10 position are undoubtedly based on their personal knowledge . ECF Nos. 42 at 1-2;
11 43 at 1-2. Similarly, Mr. Chandler, as Plaintiff’s former supervisor, undoubtedly
12 has personal knowledge of what the essential functions of the HR Analyst position
13 are. ECF No. 44 at 2.

14 This Court finds these declarations permissible for the limited purpose of
15 helping Defendants establish effective verbal communication as an essential
16 function of the HR Analyst position. As the Ninth Circuit noted in *Bates*, it is the
17 burden of the employer to produce information regarding essential functions of an
18 employee’s position. *Bates*, 511 F.3d 974 at 991. One way to satisfy this burden
19 is by producing evidence of the work experience of current and former employees.
20 *Id.* (citing 29 C.F.R. § 1630.2(n)(3)(vi), (vii)). The declarations of Ms. George-

1 Hatcher, Mr. Daling, and Mr. Chandler provide just the type of evidence
2 contemplated in the regulations and *Bates*. Moreover, for purposes of the instant
3 motions, these declarations merely supplemented other evidence Defendants
4 presented, including the HR Analyst job description and Plaintiff's testimony
5 regarding her position, in an effort to establish that effective verbal communication
6 is an essential function of Plaintiff's former position.

7 To the extent the declarations opine as to the viability of accommodations
8 for Plaintiff's disability, the Court does not find them particularly relevant or
9 helpful to its determination of the relevant law. Therefore, Plaintiff's Motion (ECF
10 No. 78) is **DENIED**.

11 **ACCORDINGLY, IT IS HEREBY ORDERED:**

12 1. Defendants' Motion for Summary Judgment (ECF No. 40) is
13 **GRANTED in part and DENIED in part**. Defendants' Motion is **GRANTED**
14 concerning Plaintiff's state law claims for wrongful discharge in violation of public
15 policy, intentional and negligent infliction of emotional distress, unpaid wages, and
16 the independent vicarious liability cause of action; and Plaintiff's ADA claim
17 regarding the Fitness for Duty Examination. As indicated herein, Defendants'
18 Motion is **DENIED** with respect to all other claims.

19 2. Plaintiff's Partial Motion for Summary Judgment (ECF No. 58) is
20

1 **GRANTED in part** and **DENIED in part**. Plaintiff's Motion is **GRANTED**
2 regarding the issues of disability and adverse employment action. As indicated
3 herein, Plaintiff's Motion is **DENIED** with respect to all other issues.

4 3. Plaintiff's Motion to Exclude Defendants' Expert Judith Clark (ECF No.
5 46) is **DENIED in part** and **GRANTED in part**.

6 4. Defendants' Motion to Exclude Expert Testimony of Jennifer Morphis
7 (ECF No. 54) is **DENIED in part** and **GRANTED in part**.

8 5. Plaintiff's Motion to Strike Declarations the Declarations of Gita George-
9 Hatcher, Dan Daling, and David Chandler (ECF No. 78) is **DENIED**.

10 The District Court Executive is hereby directed to enter this Order and
11 provide copies to counsel.

12 **DATED** October 20, 2014.



13 A handwritten signature in blue ink that reads "Thomas O. Rice".
14 THOMAS O. RICE
15 United States District Judge
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